

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act
of 1991

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CG Docket No. 02-278

**PETITION OF CONSUMER BANKERS
ASSOCIATION FOR WAIVER AND OTHER RELIEF**

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I. BACKGROUND AND SUMMARY

The member institutions of the Consumer Bankers Association (“CBA”)¹ are working diligently to comply with the telemarketing rules adopted in the Commission’s *Report and Order* of July 3, 2003, including those rules’ requirements concerning transmission of caller identification (“CLID”) information.² However, as further described herein, our members’ efforts are complicated by uncertainty concerning the scope of the CLID requirements and unanticipated technical problems with the capabilities of their equipment and vendor-provided services.

¹ The Consumer Bankers Association was founded in 1919 and is a not-for-profit trade association that provides leadership and representation on retail banking issues such as privacy, fair lending, and consumer protection legislation/regulation. The CBA develops policy that affects financial institution retail products and services. CBA members include most of the nation’s largest bank holding companies and hold two-thirds of the industry’s total assets. CBA is the recognized voice on retail banking issues in the nation’s capital. Member institutions are the leaders in consumer finance (auto, home equity and education), retail electronic commerce, small business services, and community development.

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014 (2003)(“*Report and Order*”). See 47 C.F.R. § 64.1601(e).

The difficulties faced by the CBA's members are of two kinds. First, the members remain uncertain about the application of the CLID rules to business-to-business calls, which are expressly exempted from the telemarketing regulations of the Federal Trade Commission ("FTC") but enjoy no comparable, explicit exemption in the FCC's rules. Second, the members are encountering substantial, unforeseen difficulties, of a kind and magnitude that appear not to be anticipated by the *Report and Order*, in securing equipment, equipment upgrades and local exchange carrier ("LEC") services that will transmit a dialable telephone number from many of our members' facilities.

Accordingly, the CBA requests that the Commission: (1) confirm that the CLID requirement does not apply to business-to-business calls; (2) grant a partial waiver of the CLID requirement that extends the CLID compliance deadline to coincide with the January, 2005 deadline for compliance with the Commission's "Do-Not-Fax" rules; and (3) grant an expedited, partial waiver of the telemarketing rules pending the Commission's decision on the foregoing requests.

II. DISCUSSION

A. The Commission Should Find That The CLID Requirement Does Not Apply to Business-to-Business Calls

Many CBA members offer financial services to businesses and use the telephone to promote those services. Because these business-to-business calls present no consumer protection issues, are expressly exempted from the Federal Trade Commission ("FTC") telemarketing rules

and are within the scope of a pending petition for reconsideration of this Commission's rules,³ our members have not incurred the expense and disruption of configuring their facilities and services to transmit CLID information on calls to business telephone numbers. Now that compliance with the CLID requirement is required, however, it is critical that the Commission offer definitive guidance on this question.

Confirmation that the CLID requirement does not apply to business-to-business calls is fully justified. As the legislative findings accompanying the Telephone Consumer Protection Act ("TCPA") show, Congress's purpose in enacting that legislation was not to interfere with business-to-business communications but to protect "customers . . . [from] the proliferation of intrusive, nuisance calls *to their homes* from telemarketers."⁴ Similarly, the FTC's Telemarketing Sales Rule, adopted in 1995, restricted telemarketing practices aimed at consumers but exempted "business-to-business calls, except those involving the sale of non-durable office or cleaning supplies."⁵ When the FTC amended its Telemarketing Sales Rule, including amendments designed to implement the national Do-Not-Call Registry and require the transmission of CLID information, it expressly retained the business-to-business exemption for the requirements set out in those amendments.⁶

³ Petition for Reconsideration of Direct Marketing Association at 8-10, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 and CC Docket No. 92-90 (Aug. 25, 2003).

⁴ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2, 105 Stat. 2394 (1991)(emphasis added).

⁵ 68 Fed. Reg. 4581 (Jan. 29, 2003).

⁶ *Id.* at 4674.

When this Commission undertook to write its most recent telemarketing rules, it repeatedly emphasized that its intention, like that of Congress and the FTC, was to protect consumers.⁷ The Commission also made clear that its rules would be as consistent as possible with those of the FTC.⁸ Nonetheless, in the rules adopted in July of last year, the FCC did not expressly exempt calls to business telephone numbers from its regulations, including the requirement to pass CLID. This omission not only creates an unexplained inconsistency between the FCC's rules and those of the FTC; it extends the CLID requirement to cases that are unrelated to the purpose of that requirement. As the Commission made clear, the CLID rule was adopted because “[c]onsumers are frustrated by the failure of many telemarketers to transmit caller ID information, which, under certain circumstances, makes it difficult for *consumers* to enforce the TCPA.”⁹ More specifically, the CLID requirement is intended to facilitate do-not-call requests from consumers -- requests that telemarketers are not required to honor when made by business subscribers.¹⁰ Nothing in the *Report and Order* suggests that the Commission intended this rule to place new burdens on business-to-business communications, or explains why businesses subject to FCC jurisdiction should shoulder such burdens while businesses

⁷ “In this Order, we revise the current Telephone Consumer Protection Act (TCPA) rules and adopt new rules to provide *consumers* with several options for avoiding unwanted telephone solicitations . . . We believe the rules the Commission adopts here strike an appropriate balance between maximizing *consumer privacy* protections and avoiding imposing undue burdens on telemarketers.” *Report and Order*, 18 FCC Rcd at 14017 (emphasis added).

⁸ “Consistent with the mandate of Congress in the Do-Not-Call Act, the national do-not-call rules that we establish in this order ‘maximize consistency’ with those of the FTC.” *Id.* at 14033 (citation omitted).

⁹ *Id.* at 14118 (emphasis added)(citation omitted).

¹⁰ “Caller ID allows consumers to screen out unwanted callers and to identify companies that they wish to ask not to call again.” *Id.* at 14121. The Commission’s rules only require
(Footnote continues on next page.)

subject to the FTC do not. Unfortunately, the Commission still has not responded to a petition that requests correction of this oversight,¹¹ and the CBA's members are facing uncertainty as to their potential exposure to enforcement actions for failure to transmit CLID on calls to businesses. The Commission should confirm that the CLID requirement does not apply to calls placed to business telephone numbers.

B. The Commission Should Grant A Partial Waiver Of The CLID Requirement Until January, 2005

The Commission's CLID requirement was adopted in the face of considerable doubt about its technical feasibility. The experience of the CBA's members amply confirms those doubts and justifies relief from the CLID compliance deadline.

In its Notice of Proposed Rulemaking, the Commission asked for comment on a proposed requirement that all telemarketers transmit Caller Identification information to called parties.¹² In response, some commenters pointed out technical problems that might prevent or delay full compliance with such a requirement. Notably, Worldcom, Inc. ("Worldcom") noted that "telemarketers using a private branch exchange (PBX) that connects to their telephone company through typical T1 trunks are not able to [pass] CPN."¹³ Worldcom acknowledged that ISDN

(Footnote continued from previous page.)

telemarketers to comply with such requests when they are made by residential subscribers. 47 C.F.R. § 64.1200(d)(3).

¹¹ Petition for Reconsideration of Direct Marketing Association, *supra* note 3.

¹² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd 17459, 17475-76 (2002).

¹³ Worldcom Reply Comments at 23, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 and CC Docket No. 92-90 (Jan. 31, 2003) ("Worldcom Reply Comments"). CPN stands for "Calling Party Number." 47 C.F.R. sec. 64.1600(c).

service, where available, might transmit CPN, but pointed out that “[e]ven where ISDN is available, many carriers’ network switches would have to be upgraded, at great expense, with the addition of a significant number of digital switch ports to accommodate the telemarketers’ shift to ISDN-PRI trunks.”¹⁴ Also, as Worldcom noted, “it would be a substantial cost for telemarketers to upgrade their systems or purchase new equipment” for this purpose.¹⁵

The *Report and Order* makes some effort to address these concerns. The Commission acknowledged that transmission of CPN over a T1 line may not be possible, but noted that even where a PBX is connected to a T1 trunk, “ANI is transmitted to the Local Exchange Carrier for billing purposes.”¹⁶ Accordingly, the Commission determined that telemarketers may provide either CPN or ANI in order to satisfy the CLID requirement.¹⁷ Also, the Commission stated that “[i]f the information required is not passed through to the customer, through no fault of the telemarketer originating the call, then the telemarketer will not be held liable for failure to comply with the rules.”¹⁸ However, the Commission declared that “[a]ny number supplied must

¹⁴ *Worldcom Reply Comments* at 24

¹⁵ *Id.*

¹⁶ *Report and Order*, 18 FCC Rcd at 14123. “ANI [Automatic Number Identification] is the calling party’s billing number, which often, but not always, is the same as the CPN. Typically, CPN and ANI are the same for residence telephone lines, while often in the case of business lines, CPN and ANI are different. The delivery of ANI from a local exchange carrier switch to an interexchange carrier switch is primarily to enable interexchange carriers to bill their customers.” *Rules and Policies Regarding Calling Number Identification Service – Caller ID*, Order and Fourth Notice of Proposed Rulemaking, 10 FCC Rcd 13796, 13799 n.32 (1995); *see also* 47 C.F.R. sec. 64.1600(b)-(c).

¹⁷ *Report and Order*, 18 FCC Rcd at 14121-22.

¹⁸ *Id.* at 14121. In such cases, however, “the telemarketer must provide clear and convincing evidence that the caller ID information could not be transmitted.” *Id.*

permit an individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.”¹⁹

Unfortunately, the Commission’s solution appears to be based on a flawed assumption, *i.e.*, that the “ANI” number transmitted over a T1 facility is always a number that can be used by the called party to make a return call. In fact, the CBA’s members have found that for many of their facilities, the LEC is presently able to transmit only a billing telephone number (“BTN”) that is not a valid, complete North American Numbering Plan number. Accordingly, if a customer should attempt to use such a number to make a return call, the customer will receive an intercept message stating that the call cannot be completed as dialed. In other words, transmission of such a BTN will not “permit an individual to make a do-not-call request . . .” as the rules require.²⁰ CBA members have encountered a similar problem with services based on analog copper loops, which in some cases can transmit ANI numbers but cannot complete return calls placed to those numbers.

These limitations in existing facilities and LEC services present our members with a dilemma. Because the LECs *can* pass a telephone number to the called party over T1 and analog copper facilities, our members using those services may be unable to show by “clear and convincing” evidence that transmission of CLID information *of some kind* over their existing service is impossible. However, by satisfying their apparent obligation to transmit such information, our members may be found to violate the requirement that any number transmitted to the called party’s caller ID box must be a number that can be used to make a do-not-call request. With the customer premises equipment and LEC services now in place at many of our

¹⁹ *Id.* at 14122.

²⁰ *Id.*

members' calling locations, it is impossible for our members to avoid an apparent violation of the rules.

The most direct response to this dilemma would be a finding, by the Commission, that inability to transmit a dialable number, because of limitations in the telemarketer's facilities and LEC services, does not violate the rules at all. Such a finding would be consistent with the general approach to technical limitations taken in the *Report and Order*, which states that telemarketers will not be liable if "the [CLID] information required is not passed . . . through no fault of the telemarketer originating the call."²¹ With this finding, the Commission quite reasonably disclaimed any intention to make telemarketers responsible for problems not within their control. Similarly, the CLID requirement should be interpreted as not imposing liability when telemarketers' services and facilities are capable only of passing a non-dialable telephone number to the called party's CLID service.

Rather than request such an express interpretation of the rules at this time, however, the CBA members are prepared to continue to pursue technical and service solutions to the present limitations of their services based on T1 and analog copper facilities. The scope of that task, however, is greater than the *Report and Order* acknowledged when it stated that "caller ID information can be transmitted cost effectively for the vast majority of calls made by telemarketers," and that the equipment upgrades required to support such transmissions would not involve significant costs.²² In fact, the reality is quite different. One of the CBA's members, for example, reports that technical limitations affect over 1,000 of its calling facilities served by over 3,500 T1 trunks. Added to the quantitative scope of the problem is the difficulty of

²¹ *Id.* at 14121.

²² *Id.* at 14121, 14123.

coordinating with LECs and equipment vendors to assess the technical problems, find appropriate solutions, complete the required equipment upgrades and replacements, obtain new LEC services where required, and complete the installation, testing and personnel training processes that new equipment and service configurations require. The length of time needed to complete these processes likely will grow as vendors confront increased demand from businesses trying to comply with the CLID requirement.

The technical difficulties posed by compliance with the CLID requirement also extend to facilities that *are* technically capable of transmitting a dialable number but do not presently do so. Some facilities transmit a number at which “do not call” processing capability is not in place, or pass CLID information that is not helpful to the consumer or fully compliant with the rules. For example, some carriers now can transmit an identifier for the calling party that corresponds with a name in the carrier’s billing records but does not meaningfully identify the calling business to the customer.²³ Some LECs report that their existing services cannot be used to pass 1-800 or other numbers that would make the do-not-call process more convenient for consumers. In many such cases, our members still are working with LECs and other vendors to determine which solutions are appropriate and how those solutions will be implemented. Estimates of the time and cost to solve these problems vary widely and in some cases are not yet available.

In these circumstances, the Commission should grant a reasonable, limited waiver that extends the CLID requirement deadline to a date by which orderly and efficient compliance efforts can be completed. As the Commission recently has pointed out, the Commission “may exercise its discretion to waive a rule where the particular facts make strict compliance

²³ In some cases, the LECs’ billing databases still contain the names of predecessor institutions to the entities actually making the calls, and the names of those nonexistent entities are transmitted to called parties through no fault of the calling party.

inconsistent with the public interest.”²⁴ In granting a waiver, “the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.”²⁵ This standard is fully satisfied in this case. Notably, equity and effectiveness of implementation both require that the Commission take into account the unexpected difficulties that compliance presents for many telemarketers using services based on T1 and analog copper facilities. Granting of a waiver also would serve the public interest. During the limited duration of the requested waiver, the CBA’s members will continue to comply with other telemarketing requirements, including those regulations that require telemarketers to give identifying information to customers and comply with do-not-call requests. Members also will pass the full complement of CLID information where their equipment and services permit. Accordingly, granting of the requested waiver will not expose consumers to the abuses the TCPA, and this Commission’s rules, are intended to prevent.

Because of the wide variety of problems our members have encountered and the lack of finality of our members’ discussions with vendors, the length of the required waiver cannot be stated with precision. However, the CBA believes that an extension of the CLID compliance date to January, 2005 -- the extended date now set for compliance with certain “Do-Not-Fax” requirements -- will be reasonable. Accordingly, the CBA requests an extension of the compliance date for the CLID rules, limited to facilities and services that are not presently configured to meet the CLID requirements, until January, 2005. The CBA also requests that this

²⁴ *Telephone Number Portability*, Order, FCC 04-12, ¶ 6 (Jan. 16, 2004)(citation omitted).

²⁵ *Id.* (citation omitted).

extension of time, when granted, be made retroactive to the compliance deadline of January 29, 2004.

Finally, the CBA requests that during the time this petition is under consideration, the Commission grant an expedited, interim waiver of the CLID requirement, retroactive to January 29, 2004, for business-to-business calls and CBA member facilities served by T1 and analog copper trunks, until a ruling on this petition can be obtained. Such an interim waiver will preserve the *status quo* and will not harm the public interest.

III. CONCLUSION

The CBA and its member institutions believe that the Commission's telemarketing rules are a constructive, realistic approach to the rights and interests of consumers and the business community. The relief requested herein will tailor those rules more closely to the Commission's policy goals and improve the compliance process. Accordingly, the CBA requests that this petition be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Theresa Rollins, do hereby certify that I have on this 29th day of January, 2004, had copies of the foregoing **PETITION FOR WAIVER AND OTHER RELIEF**, delivered to the following electronic mail, as indicated:

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